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Molly C. Dwyer, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-16598

Appeal from the United States District Court for the Eastern District of California

Lawrence J. O'Neill, District Judge, Presiding

D.C. No. CV-03-06364-LJO-DLB

MEMORANDUM*

- x

KEVIN E. FIELDS

Plaintiff - Appellant,

v.

WILBUR; et al.,

Defendants - Appellees.

- x

Argued and Submitted December 9, 2009
San Francisco, California

Before: COWEN,** GRABER, AND BYBEE,
Circuit Judges.

Plaintiff Kevin E. Fields, a California state prisoner, appeals from the entry of summary judgment against him in his 42 U.S.C. § 1983 action alleging that prison officials of the California Department of Corrections and Rehabilitation (Defendants), violated his constitutional rights. On de novo review, *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008), we affirm.

1. Plaintiff was required to exhaust all available administrative remedies before filing this action in federal court. 42 U.S.C. § 1997e(a); *see also Booth v. Churner*, 532 U.S. 731, 738-39 (2001) (holding that exhaustion of the administrative process is required so long as there is a "possibility of some relief"). The letter sent by the Inmate Appeals Branch to Plaintiff on March 24, 2003, explicitly instructed Plaintiff to contact the Appeals Coordinator if he disagreed with the rejection of his grievance appeal. Plaintiff did not contact the Appeals Coordinator before filing a complaint in the district court. Because an additional avenue of possible relief remained open to him, which he chose not to pursue, Plaintiff failed to exhaust all available administrative remedies.

2. We review for abuse of discretion a district court's denial of appointment of counsel. *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Aug. 31, 2009) (No. 09-6429). Plaintiff demonstrated sufficient verbal and writing ability and legal knowledge to articulate his claim. The facts that he alleged and the issues that he raised were not of substantial complexity. In sum, exceptional circumstances that would require appointment of counsel do not exist here. *See* 28 U.S.C. § 1915; *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (holding that a finding of exceptional circumstances requires an evaluation of both "the likelihood of success on the merits and the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the issues involved" (internal quotation marks omitted)).

AFFIRMED.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
CASE NO: 1:03-CV-06364-LJO-DLB

JUDGMENT IN A CIVIL CASE

- - - -

by: /s/ I. Lira
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

1:03-cv-06364-OWW-DLB-P

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS (Doc. 159)

ORDER GRANTING MOTION FOR VOLUNTARY DISMISSAL OF CERTAIN DEFENDANTS (Doc. 154)

ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT (Doc. 144)

- x

KEVIN E. FIELDS

Plaintiff,

v.

RUIZ et al.,

Defendants.

- x

Plaintiff, Kevin Fields ("plaintiff"), is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302.

On June 25, 2007, the Magistrate Judge filed Findings and Recommendations herein which were served on the parties and which contained notice to the parties that any objections to the Findings and Recommendations were to be filed on or before July 25, 2007. On July 16, 2007, plaintiff filed objections to the Magistrate Judge's Findings and Recommendations. On July 25, 2007, defendants filed objections to the Magistrate Judge's Findings and Recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 73-305, this Court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the Court finds the Findings and Recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations, filed June 25, 2007, are ADOPTED IN FULL;

2. Plaintiff's motion for voluntary dismissal of defendants Robertson and Dill, filed April 11, 2007, is GRANTED;

3. Defendants' motion to dismiss the retaliation claim against defendants, Ruiz, Wilbur, Canfield,

and Fulbrodt is GRANTED WITHOUT PREJUDICE;

4. Defendants' motion for summary judgment, filed December 21, 2006, is GRANTED IN PART; and,

5. This case shall proceed to trial on plaintiff's Eighth Amendment claims against defendants Ruiz, Wilbur, Canfield, Fuhlrodt, and Rabe.

IT IS SO ORDERED.

Dated: September 9, 2007

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NO. 1:03-CV-6364-OWW DLB-P

FINDINGS AND RECOMMENDATIONS RECOMMENDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BE DENIED IN PART (Doc. 144)

OBJECTIONS DUE JULY 25, 2007

KEVIN E. FIELDS

Plaintiff,

v.

RUIZ et al.,

Defendant.

I. Defendant's Motion for Summary Judgment

A. Procedural History

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on

plaintiff's second amended complaint, filed February 9, 2004, against defendants Robertson, Ruiz, Wilbur, Canfield, Fuhlrodt, Rabe and Dill. ("defendants") for violation of the Eighth Amendment based on the conditions of his cell and for retaliation. On April 11, 2007, plaintiff filed a motion for an order dismissing defendants Robertson and Dill. This request will be granted.

On December 21, 2006, defendants filed a motion for summary judgment. Plaintiff filed an opposition on April 16, 2007.[1] Defendants did not reply.

B. Legal Standard

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings,

[1] Plaintiff was provided with notice of the requirements for opposing a motion for summary judgment by the court in an order filed on June 21, 2004. *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988).

> depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586

(1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted).

C. Discussion

1. Plaintiff's Allegations

In his second amended complaint, plaintiff alleges that defendants violated his rights under the Eighth Amendment by leaving him a cell with an overflowing toilet for 28 days. Plaintiff also alleges that defendants Ruiz, Wilbur, Canfield and Fuhlrodt

retaliated against him for filing a grievance by serving him disproportionately small servings at dinner.

2. Defendants' Undisputed Facts[2]

A. **Background**

1. Plaintiff is properly in the custody of the California Department of Corrections and Rehabilitation (CDCR) pursuant to a valid judgment in the San Joaquin County Court in which he was convicted of assault with a deadly weapon with force likely to cause great bodily injury, plus enhancements, and sentenced to a term of 25 years to life. Defendants' Exhibit A, Attachment 1, p.2-3. Plaintiff was housed in the Security Housing Unit (SHU) at California State Prison - Corcoran (CSP-Cor) at times material to the matters at issue. DX A-1, p.5.

2. Defendant Dill was a Facility Captain; defendant Rabe was a Facility Lieutenant, defendant Fuhlrodt was a Correctional Sergeant and defendants Ruiz, Wilbur and Canfield were

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[2] Plaintiff did not file a separate statement of disputed facts. The Undisputed Facts are taken from Defendants' Statement of Undisputed Facts and Plaintiff's Opposition to Defendants' Motion for Summary Judgment.

Correctional Officers at CSP-Cor at times material to the matters at issue. Compl. p.2-4; ¶¶ 5-11.

3. Fields was received by CDCR on June 26, 2000, and housed at the Deuel Vocational Institution (DVI). DX A-1, p.6. Fields was placed in administrative segregation on July 12, 2000. DX A-1, p.7-41.

4. Fields was transferred to the SHU at CSP Corcoran on December 1, 2000. DX A-1, p.5.

5. Assignment to the SHU is not based on the inmates' underlying offense, but rather, the SHU is an administrative means of managing inmates who commit serious disciplinary infractions once in prison, or who become affiliated with a prison gang. DX B, Cal. Code Regs. § 3341.5, subd.(c). Thus, the SHU provides secure housing for inmates whose conduct endangers the safety of others or the security of the institution. *Id.*

6. The SHU is designed to maximize control of inmates who pose a definite and serious threat to the safety of others or themselves, and therefore, conditions inside the SHU are more restrictive than the conditions in general population and administrative segregation. DX B.

7. The SHU provides physical controls to prevent disorder, provide protection for others, and prevent criminal activities. *Id.*

8. Being housed in the more restrictive SHU, Fields initially remained virtually disciplinary free. 42-47. A chrono authored December 21, 2001, shows that Fields had remained disciplinary free for one year. DX A-1, p.42.

9. On April 17, 2002, Fields did not want to have a cell partner, and threatened to kill anyone that was assigned to his cell. DX A-1, p. 49-54.

10. On May 27, 2002, Fields was placed on paper tray status when he refused to relinquish his tray during trash and tray pick up. DX A-1, p.55.

B. Flooding of Plaintiff's Cell on October 10, 2002

11. On October 10, 2002, staff completed serving the SHU prisoners their evening meal and were in the process of collecting trash and trays. DX A-1, p.56, 59. Officers Ruiz and Wilbur arrived at Fields' cell and ordered him to return his tray. DX A-1, p.59. Fields would not relinquish his tray, complaining that his toilet was plugged up. DX A-1, p.59. Fields then ordered staff to make an emergency call to the plumber. DX A-1, p.59. The officers told Fields that a work order had been submitted, but Fields continued to hold his tray. DX A-1, p.59.

12. The officers notified Sergeant Fuhlrodt. DX A-1, p.59. Sergeant Fuhlrodt states that when he

arrived at plaintiff's cell he saw what appeared to be water on the floor, but he denies seeing solid matter. DX A-1, p.71. Officer Ruiz states that he cleaned the area outside of Fields' cell and instructed Fields on how to do the same using materials Fields had inside his cell. DX A-1, p.71. Fields still refused to give up his tray and Lieutenant Rabe was called. DX C-1.

13. At approximately 5:15 p.m., Lieutenant Rabe responded to Inmate Fields' cell. DX C, ¶ 4. After Fields complained about plumbing and staff, he returned his dinner tray to Lieutenant Rabe. *Id.*

14. Lieutenant Rabe contends that while listening to Fields, he scanned the area and observed that the tier in front of Fields' cell was clean and clear of any water, staff having already mopped and cleaned the area. DX C, ¶ 5. He also noted that the floor of Fields' cell was clear of both debris and water and it appeared that Fields had cleaned it. *Id.*

15. Because the areas appeared clean, Lieutenant Rabe made the decision not to remove Fields from his cell, believing it unnecessary. DX C, ¶ 6. However, had he seen debris on the floor, Lieutenant Rabe contends he would not have hesitated to remove Fields from his cell. *Id.*

16. Lieutenant Rabe contends that after ensuring that a work order to fix the plumbing problem had been completed, he authorized the placement of Fields on paper tray status as a precautionary

measure to prevent this type of future disruptions by Fields. DX C, ¶ 7.

17. Medical Technical Assistants made rounds on the tier which would have given inmate Fields the opportunity to address any medical issues he may have had.

18. A review of Fields' medical file shows that he did not seek medical treatment for either headache or nausea on October 10, 2002. DX D-1. Fields' medical record show that he did not seek medical treatment of any kind until October 30, 2002. DX D-1, p. 15.

19. The administrative segregation log shows that Fields ate breakfast, lunch and dinner on October 11, 2002. DX A-1, p.59.

20. On October 11, 2002, Fields was placed on water restriction for flooding the tier. DX A-1, p. 57.

21. Fields refused to go out to yard on October 12, 2002 but did not leave his cell to shower. DX A-1, p. 59.

22. On October 18, 2002, Fields again complained that his toilet was plugged up. DX A-1, p. 60. Officer Canfield called the plumber. DX A-1, p. 60. The plumber arrived at 2:00 p.m. and Fields' toilet was fixed by 2:30 p.m. DX A-1, p. 60.

C. Exhaustion of Administrative Remedies

23. On October 10, 2002, Fields filed a grievance complaining about his overflowing toilet. DX A-1, p. 73. He exhausted the grievance through the Director's level of review on May 28, 2003. DX A-1, p.80.

24. On October 28, 2002, Fields filed a grievance claiming that for the period beginning October 11, 2002, through November 10, 2002, since being placed on paper tray status, he was shorted rations at dinner. DX A-1, p.65. Fields requested that all inmates on paper tray status be interviewed, and that the departmental review board take action against Warden Scribner, Captain Dill, Lieutenant Rabe, Sergeant Fuhlrodt and Officers Ruiz and Wilbur. DX A-1, p.65-66.

25. Fields was interviewed by Sergeant Robinson on December 21, 2002. DX A-1, p. 69. During the interview, Fields stated he believed he had been shorted food on four occasions. DX A-1, p.69-70. Fields also stated that he had been receiving his meals without problem since November. DX A-1, p.70. Staff informed Sergeant Robinson that Fields received the same rations as other inmates. DX A-1, p.69-70. Fields' allegations were determined to be unfounded, and his appeal was denied at the first level of review. DX A-1, pp.68, 70.

26. Fields appealed to the second level of review on February 6, 2003, however, the appeal was cancelled on March 13, 2003. DX E (Declaration of V. Castillo), ¶ 5. Fields did not appeal the denial of his grievance further and did not file the grievance at the Director's level of review. DX E, ¶ 5.

3. Plaintiff's Eighth Amendment Claim

To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison conditions must involve "the wanton and unnecessary infliction of pain . . . ." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Although prison conditions may be restrictive and harsh, prison officials must provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety. *Id.*; *Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986); *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982). Where a prisoner alleges injuries stemming from unsafe conditions of confinement, prison officials may be held liable only if they acted with "deliberate indifference to a substantial risk of serious harm." *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).

The deliberate indifference standard involves an objective and a subjective prong. First, the alleged deprivation must be, in objective terms, "sufficiently serious . . . ." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, the prison official must "know[] of and disregard[] an excessive risk to inmate health or

safety . . .." *Farmer*, 511 U.S. at 837. Thus, a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of harm and disregards that risk by failing to take reasonable measures to abate it. *Id.* at 837-45. Prison officials may avoid liability by presenting evidence that they lacked knowledge of the risk, or by presenting evidence of a reasonable, albeit unsuccessful, response to the risk. *Id.* at 844-45. Mere negligence on the part of the prison official is not sufficient to establish liability, but rather, the official's conduct must have been wanton. *Id.* at 835; *Frost*, 152 F.3d at 1128.

"What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishment Clause depends upon the claim at issue. . . ." *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). "The objective component of an Eighth Amendment claim is . . . . contextual and responsive to contemporary standards of decency." *Id.* at 8 (quotations and citations omitted). "[E]xtreme deprivations are required to make out a[n] [Eighth Amendment] conditions-of-confinement claim." *Id.* at 9 (citation omitted). With respect to this type of claim, "[b]ecause routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.* (quotations and citations omitted).

The Eighth Amendment guarantees sanitation. *Hoptowit v. Ray*., 682 F.2d 1237, 1246 (9th Cir. 1982). "Subjection of a prisoner to lack of sanitation that is severe or prolonged can constitute an infliction of pain within the meaning of the Eighth Amendment." *Anderson v. County of Kern*, 45 F.3d 1310, 1314 (9th Cir. 1995).

Sufficiently Serious Condition

Defendants submit evidence that on October 10, 2002, the toilet in plaintiff's cell overflowed and that the flooding was a result of plaintiff having plugged up his toilet. Undisputed Fact (UF) Nos. 11-16, 20. Officers contend they called the plumber and submitted a work order to fix the toilet. UF No. 11. Sergeant Fuhlrodt contends that when he arrived at plaintiff's cell, the area outside the cell was wet but he saw no solid matter. UF 11, 12. Officer Ruiz contends he cleaned the area outside the cell and instructed plaintiff how to do the same using materials inside his cell. UF 12. Lieutenant Rabe contends when he arrived at plaintiff's cell, the area was clean and he saw no debris on the floor. UF 13-14. The segregation log shows that plaintiff received all three meals in his cell the next day and two days later, he refused to go to the exercise yard. UF 19-20.

Defendants argue that plaintiff was subjected to routine discomfort for a very short period of time and this brief inconvenience fails to meet the objective element of an Eighth Amendment violation.

The court finds that defendants have met their initial burden of informing the court of the basis for their motion, and identifying those portions of the record which they believe demonstrate the absence of a genuine issue of material fact. The burden therefore shifts to plaintiff to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 547, 586 (1986). As stated above, in attempting to establish the existence of this factual dispute, plaintiff may not rely upon the mere allegations or denials of his pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586 n.11; *First Nat'l Bank*, 391 U.S. at 289; *Strong v. France*, 474 F.2d 747, 749 (9th Cir. 1973).

In his opposition, plaintiff states that on October 10, 2002, he informed defendants Ruiz, Wilbur and Canfield that the plumbing in his cell was backing up, resulting in feces and urine in his cell from other cells on the tier. Plaintiff's Declaration in Opposition to Motion for Summary Judgment ("Plaintiff's Opposition"), ¶ 2. Plaintiff contends he informed the officers that the smell was causing him to have a severe headache and nausea. Plaintiff's Opposition, ¶ 3. Plaintiff contends that when defendant Fuhlrodt arrived at his cell, the contamination was still present. Plaintiff's Opposition, ¶ 7. Plaintiff also contends that when

defendant Rabe arrived at his cell, the feces, urine and contaminated water were still on his cell floor and he refused to call a plumber. Plaintiff's Opposition at ¶ 10. Plaintiff contends that defendants did not submit a work order until October 15, 2002 (Plaintiff's Opposition at ¶ 10) and that his toilet was in disrepair for 29 days. Opposition at ¶ 14.

Plaintiff has submitted evidence sufficient to create a disputed issue of fact concerning the objective component of his Eighth Amendment claim. It is undisputed that plaintiff's toilet was in disrepair. However, the parties dispute the length of time and the extent of the problem. In this Circuit, subjecting an inmate to confinement in a cell with a malfunctioning toilet for 29 days, as described by plaintiff, is sufficient to meet the objective requirement of the Eighth Amendment analysis.

Defendants' State of Mind

Defendants Ruiz, Wilbur, Canfield, Fuhlrodt and Rabe further argue that they were not deliberately indifferent to plaintiff's needs. Defendants argue that shortly after plaintiff complained about his toilet, a plumber was called and a work order submitted. UF 11. Defendant Ruiz contends that he cleaned the area outside of plaintiff's cell and instructed him how to clean the inside of his cell. UF 12. Defendant Fuhlrodt and Rabe state that they did not see debris of any kind on the floor of

plaintiff's cell and therefore did not believe plaintiff was at risk.

As described above, plaintiff disputes defendants' version of the events that occurred on October 10, 2002. Plaintiff contends that a work order was not submitted until October 15, 2002, five days after defendants were made aware of the condition. Defendants' exhibit indicates a date of October 15, 2002 and thus, it is not clear to the court when the order was actually submitted. Plaintiff disputes that defendant Ruiz cleaned the area outside of his cell and he contends the debris was still present when defendants Fuhlrodt and Rabe arrived. Moreover, he contends that defendants were not concerned about the debris and in fact refused to remove him from his cell so that the area could be cleaned.

In prison condition cases under the Eighth Amendment, prison officials act with the requisite culpable intent when they act with deliberate indifference to an inmates' suffering. *Anderson v. County of Kern*, 45 F.3d 1310, 1313 (9th Cir. 1995). Plaintiff has submitted evidence sufficient to create a triable issue of fact with respect to the subjective component of the Eighth Amendment claim.

Because the evidence set forth by plaintiff is sufficient to create a triable issue of fact with respect to whether or not plaintiff was subjected to conditions of confinement in violation of the Eighth Amendment, the court shall recommend that

defendants' motion for summary adjudication on plaintiff's Eighth Amendment claim be denied.

Plaintiff's Injuries

Defendants argue that plaintiff's alleged headache and nausea, were at most de mimimis and thus insufficient to state a claim for relief under the Eighth Amendment.

The Prison Litigation Reform Act provides that "[n]o Federal civil action may be brought by a prisoner confined in jail, prison, or other correctional facility, for mental and emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). The physical injury "need not be significant but must be more than *de minimis*." *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002). The physical injury requirement applies only to claims for mental or emotional injuries and does not bar claims for compensatory, nominal, or punitive damages. *Id.* at 630. Here, there is no indication that plaintiff is seeking compensatory damages for mental or emotional injuries and therefore defendants' argument is misplaced. There is a triable of issue of fact as to whether the conditions to which plaintiff was subjected were sufficiently serious under the Eighth Amendment analysis. An Eighth Amendment conditions of confinement claim does not require an allegation of injury that is more than de minimis. With respect to these types of claims, the issue is the nature of the deprivation, not the injury: "[b]ecause routine

discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation."

4. Plaintiff's Retaliation Claim

Defendant's argue that plaintiff's retaliation claim against defendants Ruiz, Wilbur, Canfield and Fuhlrodt must be dismissed because he failed to exhaust his administrative remedies with regard to this claim prior to filing suit. Exhaustion motions are properly brought pursuant to the unenumerated portion of Federal Rule of Civil Procedure 12(b), *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). The Court therefore construes this portion of defendants' motion as an unenumerated 12(b) motion.

Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The section 1997e(a) exhaustion requirement applies to all prisoner suits relating to prison life, *Porter v. Nussle*, 435 U.S. 516, 532 (2002), and requires prisoners to complete the prison's administrative process, regardless of the relief sought by the prisoner and regardless of the relief offered by the process, as long

as the administrative process can provide some sort of relief on the complaint stated,[3] *Booth v. Churner*, 532 U.S. 731, 741 (2001). "All 'available' remedies must now be exhausted; those remedies need not meet federal standards, nor must they be "plain, speedy, and effective."' *Porter*, 534 U.S. at 524 (citing to Booth, 532 U.S. at 739 n.5). "Proper exhaustion[, which] demands compliance with an agency's deadlines and other critical procedural rules ...." is required, *Woodford v. Ngo*, 126 S.Ct. 2378, 2386 (2006), and may not be satisfied "by filing an untimely or otherwise procedurally defective ... appeal," *id.* at 2382. Finally, exhaustion must occur prior to filing suit. *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002).

Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative defense

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[3] The California Department of Corrections has an administrative grievance system for prisoner complaints. Cal. Code Regs., tit 15§ 3084.1. The process is initiated by submitting a CDC Form 602. *Id.* at § 3084.2 (a). Four levels of appeal are involved, including the informal level, first formal level, second formal level, and third formal level, also known as the "Director's Level." *Id.* at § 3084.5. Appeals must be submitted within fifteen working days of the event being appealed, and the process is initiated by submission of the appeal to the informal level, or in some circumstances, the first formal level. *Id.* at §§ 3084.5, 3084.6(c).

under which defendants have the burden of raising and proving the absence of exhaustion. *Wyatt*, 315 F.3d at 1119. The failure to exhaust non-judicial administrative remedies that are not jurisdictional is subject to an unenumerated Rule 12(b) motion, rather than a summary judgment motion. *Id.* (citing *Ritza v. Int'l Longshoremen's &Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir. 1998) (per curium)). In deciding a motion to dismiss for failure to exhaust administrative remedies, the Court may look beyond the pleadings and decide disputed issues of fact. *Wyatt*, 315 F.3d at 1119-20. If the Court concludes that the prisoner has failed to exhaust administrative remedies, the proper remedy is dismissal without prejudice. *Id.*

Defendants present evidence, and plaintiff does not dispute, that he filed a grievance against defendants Ruiz, Wilbur, Canfield and Fuhlrodt on October 28, 2002, alleging that they were retaliating against him by withholding a portion of his dinner. UF 24, Comp. P. 9, ¶ 41. Plaintiff's appeal was denied at the first level of review on December 21, 2002. UF 25. Plaintiff submitted the appeal to the second level of review where it was cancelled on March 13, 2003. UF 26. Plaintiff did not pursue the appeal to the Director's Level. UF 26.

In opposition, plaintiff argues that on March 13, 2003, his appeal was assigned to an unknown prison official with a due date of June 11, 2003. Plaintiff appears to argue that since his appeal was never

answered, his administrative remedies were exhausted. However, plaintiff provides no evidence that he submitted the appeal to the Director's Level or even attempted to do so.

"[Proper] exhaustion of administrative remedies is necessary," *Woodford v. Ngo*, 126 S.Ct. 2378, 2382 (2006), and "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules...," *id.* at 2386. The court is mindful that the failure to respond to a properly filed grievance may result in a finding that exhaustion occurred. *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (when prison officials fail to respond, the remedy becomes unavailable, and exhaustion occurs); *Foulk v. Charrier*, 262 F.3d 687, 698 (8th Cir. 2001) (district court did not err when it declined to dismiss claim for failure to exhaust where prison failed to respond to grievance); *see also Brown v. Valoff*, 422 F.3d 926, 943 n.18 (9th Cir. 2005). Here, however, plaintiff has not submitted any evidence demonstrating that he timely pursued his appeal beyond the second level. Although plaintiff does submit evidence that he submitted his an [sic] appeal of the retaliation claim on October 28, 2002, that appeal was cancelled, and he failed to pursue the appeal to the Director's Level. "Proper exhaustion[, which] demands compliance with an agency's deadlines and other critical procedural rules...." is required, *Woodford v. Ngo*, 126 S.Ct. 2378, 2386 (2006), and may not be satisfied "by filing an untimely or otherwise procedurally

defective...appeal," *id.* at 2382. *Woodford*, 126 S.Ct. at 2382. Plaintiff's retaliation claim must therefor be dismissed without prejudice.

5. Qualified Immunity.

Finally, defendants argue that to the extent the court finds plaintiff has stated a claim for relief, they are entitled to qualified immunity from plaintiff's claims for damages. Qualified immunity shields government officials from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In ruling upon the issue of qualified immunity, the initial inquiry is whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the defendant's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If, and only if, a violation can be made out, the next step is to ask whether the right was clearly established. *Id.* In determining whether the right was clearly established, the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition...." *Id.* [T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 202. (internal quotations and citation

omitted). In resolving these issues, the Court must view the evidence in the light most favorable to Plaintiff and resolve all material factual disputes in favor of Plaintiff. *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003).

As set forth in the preceding section of this order, there are disputed issues of material fact regarding plaintiff's allegations that he was left in a cell with an overflowing toilet for 28 days in violation of the Eighth Amendment. Viewing the evidence in the light most favorable to plaintiff, the conduct complained of violated the Eighth Amendment. *Lopez*, 203 F.3d at 1132-33; *Allen*, 48 F.3d at 1086-88.

Turning to the second step in the analysis, in 2002, when the deprivation at issue began, the law was clearly established that subjecting a prisoner to lack of sanitation that is severe or prolonged can constitute an infliction of pain that violates the Eighth Amendment such that it would have been reasonably clear to a reasonable officer that leaving an inmate in a cell with a non-functioning toilet for 28 days would violate his rights. While defendants contend they contacted a plumber as soon as they were made aware of the condition and defendant Rabe contends that by the time he arrived and plaintiff's cell, there was no visible water or debris, plaintiff disputes defendants' version of the facts. Finally, it was clearly established in 2002 that if Defendants knew of the violation and failed to take

steps to prevent it, they could be held liable for the violation. *Cunningham*, 229 F.3d at 1289; *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

In conclusion, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). By 2002, requiring an inmate to live in a cell with a malfunctioning toilet for 28 days constituted a knowing violation of the Eighth Amendent. *Lopez* at 1133; *Allen* at 1088. Accordingly, Defendants are not entitled to judgment as a matter of law based on qualified immunity.

D. Conclusion

The court finds that there are disputed issues of material fact precluding summary judgment on plaintiff's Eighth Amendment claim and defendants are not entitled to qualified immunity. The court also finds that plaintiff failed to exhaust the administrative remedies with regard to his retaliation claim and therefore this claim must be dismissed without prejudice. Based on the foregoing, it is HEREBY RECOMMENDED that plaintiff's motion for voluntary dismissal of defendants Robertson and Dill, filed April 11, 2007 be GRANTED; defendants' motion for summary judgment, filed December 21, 2006 be GRANTED IN PART as described herein; and this case proceed to trial on plaintiff's Eighth Amendment claims against defendants Ruiz, Wilbur, Canfield, Fuhlrodt and Rabe.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). On or before July 25, 2007, the parties may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: June 22, 2007

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. LAWRENCE J. O'NEILL
1:03-cv-6364 LJO
JURY TRIAL, DAY 1

- x

KEVIN E. FIELDS

Plaintiff,

v.

RUIZ et al.,

Defendants.

- x

Fresno, California Wednesday, May 28, 2008

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Vol. 1, pgs. 1 to 231, inclusive

REPORTED BY: PEGGY J. CRAWFORD, RDR, CRR, Official Reporter

APPEARANCES OF COUNSEL:

For the Plaintiff: **KEVIN E. FIELDS, PRO SE**
P-83425
CALIFORNIA STATE PRISON
CORCORAN (3476)
P.O. BOX 3476
CORCORAN, CA 93212-3476

For the Defendants: STATE OF CALIFORNIA
Department of Justice
Office of the Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
By: **KELLI M. HAMMOND**
Deputy Attorney General

. . . . . .

...

So stop playing games. I know that you believe that you are not playing games, or perhaps that's just what you are saying and you know you are playing games.MR. FIELDS: No, I don't know that.

THE COURT: But I'm telling you that there is nothing in this record to establish, other than what you are saying, that there is any appellate issue with regard to your medication.

And I'm telling you from an objective standpoint, there is nothing there except your words because, objectively, there is nothing to establish or to substantiate your position.

Now I think you and I have both made our statements on the record clear.

MR. FIELDS: One more thing. You said all my motion have been ruled on. Actually, I have an outstanding motion for reconsideration that has never been ruled on.

THE COURT: Reconsideration for what?

MR. FIELDS: For appointment of counsel.

THE COURT: I believe that's the sixth request that you have made for counsel - -

MR. FIELDS: No, it is not.

THE COURT: I believe it is the sixth request. We are not going to continue to play that game either.

They have been denied and there is nothing new. Your motion for reconsideration is not legally sound and it is denied.

If that's what you want as a ruling, you got it.

Now we are ready for the jury.

MR. FIELDS: Your Honor, God doesn't like ugly.

THE COURT: I beg your pardon?

MR. FIELDS: God doesn't like ugly.

THE COURT: I don't know what that means, but it's not worth pursuing.

(Plaintiff spoke under his breath.)

THE COURT: Sir, we had a motion, we ruled on it.

Now the jury is coming in.

(The following proceedings were had in the presence of the jury, to wit:)

THE COURT: We are still on the record and the jury has joined us.

Who are you calling now as a witness?

MR. FIELDS: Inmate Bland.

JOMO BLAND,

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

THE COURT: Could you tell us your name?

THE WITNESS: Jomo Bland.

THE COURT: How do you spell your first name?

THE WITNESS: J-o-m-o.

...

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NO. 1:03-cv-06364-OWW DLB PC

ORDER RE MOTIONS TO APPOINT COUNSEL
(Docs. 182, 183)

KEVIN E. FIELDS

Plaintiff,

v.

RUIX et al.,

Defendants.

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. section 1983. This action is proceeding on plaintiff's second amended complaint, filed February 9, 2004, against defendants Ruiz, Wilbur, Canfield, Fuhlrodt and Rabe for violation of the Eighth Amendment. This matter is set for jury trial on May 27, 2008 at 9:00 a.m. before the Honorable Judge Wanger.

On April 23, 2008, plaintiff filed a motion stylized as a letter, in which plaintiff requests that that all six inmate witnesses listed in defendant's pre-trial statement be permitted to testify at trial. (Doc. 182). Plaintiff further requests that the court request pro bono counsel to represent him. Finally, plaintiff seeks an order directing the Clerk of the Court to provide plaintiff with a transcript of the telephonic trial confirmation hearing held April 24, 2008, on the grounds that because of medication he is currently taking, his memory of the conference is "kind of fuzzy".

On April 24, 2008, plaintiff filed another motion for the appointment of counsel. (Doc. 183).

1. Motion for Attendance of Incarcerated Witnesses

During the telephonic trial confirmation hearing held April 24, 2008, plaintiff agreed that four of plaintiff's six proposed inmate witnesses were not required at trial, as their testimony would be duplicative. Plaintiff now states in his instant motion that their testimony is relevant to prove state of mind, and that all six proposed witnesses ought to testify at trial.

Notwithstanding plaintiff's concession during the telephonic trial confirmation hearing that four of his proposed inmate witnesses were not necessary at trial, plaintiff has not filed any declarations stating that his proposed incarcerated witnesses have actual knowledge of relevant facts. Plaintiff was explicitly

informed that he was required to do so by this court's order dated November 2, 2007, which described in detail for plaintiff the procedure for obtaining the attendance of incarcerated witnesses. (Doc. 166). Plaintiff was further placed on notice of this requirement in defendants' pre-trial statement, wherein defendants objected to the attendance of plaintiff's inmate witnesses on these very grounds. (Doc. 176, pp.4-5). Plaintiff's bare contention that their testimony is now relevant to show "state of mind" is not supported whatsoever by any evidence.

Therefore, the court will not issue transportation writs for Inmate E. Johnson, Inmate G. Jones, Inmate White, or Inmate Smith. As provided for in this court's pre-trial order (doc. 185), inmate witnesses Bland and German will attend at trial, and the clerk of the court will prepare transportation writs to facilitate their attendance.

2. Request for Court Transcripts

There is no provision under the Federal Rules or the Local Rules for free copies of transcripts. Further, the expenditure of public funds on behalf of an indigent litigant is proper only when authorized by Congress. *See Tedder v. Odel*, 890 F.2d 210 (9th Cir. 1989) (citations omitted). The in forma pauperis statute does not authorize the expenditure of public funds for the purpose sought by plaintiff in the instant motion. If plaintiff wishes to order a copy of the transcript, he is required to pay the appropriate

fee to the court reporter. Plaintiff's request for free copies of the transcript is DENIED.

///

///

3. Motion for Appointment of Counsel

Plaintiff contends that in the past, the court denied plaintiff's requests for appointment of counsel without considering a) the merits of the case; b) plaintiff's ability to present and comprehend his case; c) his custody status; d) the complexity of the legal issues involved; and e) the amount of factual investigation and discovery necessary to prove the claim. (Doc. 183, p.2). Plaintiff now renews his request for the appointment of counsel.

A review of the court record indicates that plaintiff has filed at least four requests for appointment of counsel (Docs. 74, 86, 98 and 147). Each of plaintiff's previous requests were denied. (Docs. 78, 90, 100 and 163). In each case, it was explained to plaintiff that the United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983 cases. *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 109 S.Ct. 1814 (1989). Plaintiff was further advised that in certain exceptional circumstances, the court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Without a reasonable method of securing and compensating counsel, this court will

seek volunteer counsel only in the most serious and exceptional cases.

In the present motion, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations, which proved, would entitle him to relief, his case is not exceptional. Further, plaintiff appeared lucid, and was capable of thinking and expressing himself clearly, throughout the telephonic trial confirmation hearing that lasted approximately one hour. Accordingly, plaintiff's request for counsel is DENIED.

IT IS SO ORDERED.

Dated: April 30, 2008

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

1:03-cv-06364-OWW DLB (PC)

ORDER DENYING FOURTH MOTION FOR APPOINTMENT OF COUNSEL (DOCUMENTS #182 & #183)

- - - -

exceptional circumstances the court may request the voluntary assistance of counsel pursuant to section 1915(e)(1). *Rand*, 113 F.3d at 1525.

Without a reasonable method of securing and compensating counsel, the court will seek volunteer counsel only in the most serious and exceptional cases. In determining whether "exceptional circumstances exist, the district court must evaluate both the likelihood of success of the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the complexity of the legal issues involved." *Id.* (internal quotation marks and citations omitted).

In the present case, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This court is faced with similar cases almost daily. Further, at this early stage in the proceedings, the court cannot make a determination that plaintiff is likely to succeed on the merits, and based on a review of the record in this case, the court does not find that plaintiff cannot adequately articulate his claims. *Id.*

For the foregoing reasons, plaintiff's motion for the appointment of counsel is HEREBY DENIED, without prejudice.

IT IS SO ORDERED.

Dated: April 28, 2008

/s/ **Dennis L. Beck**
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

1:03-CV-06364-OWW-DLB-P

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL
(DOCUMENT #147)

- - - -

In certain exceptional circumstances, the court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Without a reasonable method of securing and compensating counsel, this court will seek volunteer counsel only in the most serious and exceptional cases.

In the present case, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This court is faced with similar cases almost daily. Therefore, plaintiff's request for the appointment of counsel must be denied.

In accordance with the above, IT IS HEREBY ORDERED that plaintiff's request for the appointment of counsel is denied.

IT IS SO ORDERED.

Dated: September 24, 2007

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

1:03-cv-6364-OWW-DLB-P

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL
(DOCUMENT #98)

KEVIN E. FIELDS

Plaintiff,

v.

J. P. RUIZ, et al.,

Defendants.

Plaintiff has once again requested the appointment of counsel. As plaintiff has been advised, the United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983 cases. *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 109 S.Ct. 1814 (1989).

In certain exceptional circumstances, the court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Without

a reasonable method of securing and compensating counsel, this court will seek volunteer counsel only in the most serious and exceptional cases.

In the present case, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This court is faced with similar cases almost daily. Therefore, plaintiff's request for the appointment of counsel must be denied.

In accordance with the above, IT IS HEREBY ORDERED that plaintiff's request for the appointment of counsel is denied.

IT IS SO ORDERED

Dated: February 9, 2006

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
1:03-CV-6364-OWW-DLB-P

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL
(DOCUMENT #86)

KEVIN E. FIELDS

Plaintiff,

v.

J. P. RUIZ, et al.,

Defendants.

Plaintiff has requested the appointment of counsel. The United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983 cases. *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 109 S.Ct. 1814 (1989).

In certain exceptional circumstances, the court may request the voluntary assistance of

counsel pursuant to 28 U.S.C. § 1915(e)(1). Without a reasonable method of securing and compensating counsel, this court will seek volunteer counsel only in the most serious and exceptional cases.

In the present case, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This court is faced with similar cases almost daily. Therefore, plaintiff's request for the appointment of counsel must be denied.

In accordance with the above, IT IS HEREBY ORDERED that plaintiff's request for the appointment of counsel is denied.

IT IS SO ORDERED

Dated: December 21, 2005

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
1:03-CV-06364-OWW-DLB-P

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL
(DOCUMENT #74)

- - - -

counsel pursuant to 28 U.S.C. § 1915(e)(1). Without a reasonable method of securing and compensating counsel, this court will seek volunteer counsel only in the most serious and exceptional cases.

In the present case, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This court is faced with similar cases almost daily. Therefore, plaintiff's request for the appointment of counsel must be denied.

In accordance with the above, IT IS HEREBY ORDERED that plaintiff's request for the appointment of counsel is denied.

IT IS SO ORDERED.

Dated: November 21, 2005

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

FILED

MAR 01 2010

Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 08-16598

D.C. No. 1:03-cv-06364-LJO-DLB
Eastern District of California, Fresno

ORDER

KEVIN E. FIELDS

Plaintiff - Appellant,

v.

WILBUR et al.,

Defendants - Appellees.

Before: COWEN,* GRABER, and BYBEE,
Circuit Judges.

Judges Graber and Bybee have voted to deny the petition for rehearing en banc, and Judge Cowen has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing en banc is DENIED.

* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

STATE OF CALIFORNIA
DEPARTMENT OF CORRECTIONS

INMATE/PAROLEE APPEAL FORM
CDC 602 (12/87)

Location: Institution/Parole Region

1. CSP Corcoran

Log No.

1. 02-03865

Category: 9B

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME: Fields, Kevin

NUMBER: P83425

ASSIGNMENT: (4A) Security Housing Unit

UNIT/ROOM NUMBER: 4R-22

A. Describe Problem: Appellant was placed on paper tray status on 10/10/02, for holding his dinner tray because third watch staff attempted to feed him in a cell which had human excrement and urine floating around which was caused by the plumbing backup up in cell's # 22-23-32-33, as a result of holding the tray so that the building Sgt., and Lt. Rabe, could be notified which ended with unsatisfactory results. Appellant was placed on paper-
(cont. on additional page)

B. Action Requested: Appellant request the following: (1) That an audit be conducted, and that all inmates placed on paper-tray status be interviewed. (2) That upon completion of an internal investigation, that this matter be (cont.)

Inmate/Parolee Signature: s/ Kevin Fields
#P83425

Date Submitted: 10/28/02

C. Informal Level (Date Received: _____)

Staff Response: BYPASS

CSP - CORCORAN
APPEALS OFFICE
02-NOV 13 PM 12:40

D. Formal Level
If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

BYPASS

CSP - CORCORAN
APPEALS OFFICE
03 FEB 11 PM 2:53

4/4/03

First Level: ☐ Granted ☐ P. Granted ☑ Denied ☐ Other MAR 27 2003

E. Reviewer's Action (Complete within 15 working days): Date assigned: NOV 15 2002 **Due date:** 1/2/03

Interviewed by: Sgt. D. Robertson see attached.

Staff Signature: s/ [illegible]
Title: Captain
Date Completed: 12/30/02
Division Head Approved:
Signature: s/ [illegible]

Title: [illegible]
Returned Date to Inmate: JAN 13 2003

F. If dissatisfied, explain reasons for requesting a Secone-Level Review, and submit to Institution or Parole Region Appeals Coordinator within 15 days of receipt of response.

I am dissatisfied with the staff response and the staff stamped this appeal on Jan. 13, 2003, however I didn't receive it until Feb. 6, 2003, meaning that staff are intentionally violating the time constraints in CCR Title 15, § 3084.6

Signature: s/ Kevin Fields

Date Submitted: 2/6/2003

Second Level: ☐ Granted ☐ P. Granted ☐ Denied ☐ Other

G. Reviewer's Action (Complete within 10 working days): Date assigned: MAR 13 2003
Due Date: 4/11/03

CSP - CORCORAN
APPEALS OFFICE
03 FEB 11 AM 11:37

CSP - CORCORAN
APPEALS OFFICE
03 MAR 12 PM 10:55

H. If dissatisfied, add data or reasons for requesting a Director's Level Review, and submit by mail to the third level within 15 days of receipt of response.

Signature: _____ **Date Submitted:** _____

For the Director's Review, submit all documents to:

Director of Corrections
P.O. Box 942883
Sacramento, CA 94283-0001
Attn: Chief, Inmate Appeals

Director's Action: ☐ Granted ☐ P. Granted ☐ Denied ☐ Other

Date: _____

(Cont of A.) status, beginning [sic] on 10/11/02, thru 11/10/02, thus Appellant has been violated of his rights guaranteed by C.C.R. Title 15 Section(s) 3004.(a), 3343.(d). During third watch, and since the commencement of being placed on the forementioned

status, [sic] Appellant's dinner tray has been substantially short, and staff [sic] nor their supervisors have done nothing to rectify this problem, thus subjecting Appellant to cruel and unusual punishment. Violating Appellant's due process rights protected by the United States Constitutional Rights under the 8th Amendment, and California's Constitutional Rights under Article I, Section 17;

(Cont of B (action requested)) referred to the Departmental Review Board, for the appropriate actions against the following staff, A K Scribner, N. Dill, Lt. Rabe, Sgt. F. Fuhlrodt, C/O Ruiz, and C/O Wilbur, 4A4R Building Staff. (3) That Appealant not be retaliated against for exercising his appeal rights, by (1) moving appealant to another unit, or by further discrimination with his evening meal.

s/ Kevin Fields #P83425, 10/28/02

California Depatment of Corrections
MEMORANDUM

Facility Captain's Office
IV-A, SHU

FIRST FORMAL LEVEL APPEAL RESPONSE

Date: December 21, 2002

To: Inmate Fields, P 38425

Subject: FIRST LEVEL RESPONSE TO CDC 602, LOG NO. CSP-COR 02-03865

APPEAL DECISION: DENIED

INTERVIEWED BY: D. Robertson, Correctional Sgt.

APPEAL ISSUE: Staff Complaint

APPEAL RESPONSE: Sergeant Robertson interviewed you on December 21, 2002 regarding your allegation of staff misconduct. In addition to your interview a fact-finding inquiry was conducted concerning all staff and inmates involved.

An investigation was initiated and has been completed. The findings are confidential and shall not be disclosed. If any misconduct was discovered, appropriate corrective action will be taken.

Considering the above information your appeal is DENIED at the first level of review. Allegations of misconduct are NOT SUSTAINED.

/s NATE DILL
Facility Captain
Facility IV-A

/s D.D. ORTIZ
Associate Warden
Facility IV-A

STATE OF CALIFORNIA—YOUTH AND ADULT CORRECTIONAL AGENCY
GRAY DAVIS, Governor

DEPARTMENT OF CORRECTIONS
Inmate Appeals Branch
P.O. Box 942883
Sacramento, CA 94283-0001

March 24, 2003

Fields, CDC #P-83425
California State Prison, Corcoran
P.O. Box 8800
Corcoran, CA 93212-8800

Re:

Dear Mr. Fields:

The enclosed documents are being returned to you for the following reasons:

This office provides the Director's Level Review of inmate/parolee appeals. The form must be completed through the Second Level of Review on behalf of the Warden or Parole Region Administrator. Your appeal was rejected,

withdrawn or cancelled. If you disagree with that decision, contact the Appeals Coordinator. You must comply with instructions from that office.

Your assigned counselor, the Appeals Coordinator, or your Parole Agent can answer any questions you may have regarding the appeals process. Library staff can help you obtain any addresses you need.

/s/ N. Grannis

N. GRANNIS, Chief

Inmate Appeals Branch